(4)

No. 88-1532

Supreme Court, U.S.
FILED
MAY 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HAZARDOUS WASTE TREATMENT COUNCIL,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF THE ENVIRONMENTAL DEFENSE FUND, NATIONAL WILDLIFE FEDERATION AND NATURAL RESOURCES DEFENSE COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

KAREN L. FLORINI
Environmental Defense Fund
1616 P Street, N.W.
Washington, D.C. 20036
(202) 387-3500

NORMAN L. DEAN, JR.
ERIK D. OLSON
National Wildlife Federation
1400 16th Street, N.W.
Washington, D.C. 20036
(202) 797-6800

JACQUELINE M. WARREN
Natural Resources Defense Council
40 W. 20th Street
New York, New York 10011
(212) 727-2700

ROBERT V. PERCIVAL *
University of Maryland
School of Law
500 W. Baltimore Street
Baltimore, Maryland 21201
(301) 328-8030

* *Counsel of Record for Amici Curiae*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

13 pp

QUESTION PRESENTED FOR REVIEW

Whether firms that have invested in technology for treating hazardous wastes should be disqualified from obtaining judicial review, under the Administrative Procedure Act, of Environmental Protection Agency decisions concerning regulation of hazardous waste because of the firms' financial interest in strict implementation of the regulatory statute.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
REASON FOR GRANTING THE WRIT	4
I. THE DECISION BELOW ADOPTS A NOVEL AND RESTRICTIVE INTERPRETATION OF THE "ZONE OF INTERESTS" TEST FOR PRUDENTIAL STANDING IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT	4
CONCLUSION	9

TABLE OF AUTHORITIES

Cases: Page

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970) 4, 6
Block v. Community Nutrition Institute, 467 U.S. 340 (1984) 7
Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) 4
Clarke v. Securities Industry Ass'n, 479 U.S. 388 (1987) 4, 5, 6
Environmental Defense Fund v. EPA, 852 F.2d 1316 (D.C. Cir. 1988), *cert. denied sub nom. American Mining Congress v. Environmental Defense Fund*, 109 S.Ct. 1120 (1989) 7 n.4
Hazardous Waste Treatment Council v. EPA, 861 F.2d 270 (D.C. Cir. 1988) 7 n.4
Investment Company Institute v. Camp, 401 U.S. 617 (1971) 4, 5, 6
Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221 (1986) 4
Sierra Club v. Morton, 405 U.S. 727 (1972) 4
The Chicago Junction Case, 264 U.S. 258 (1924) 4

Statutes:

Administrative Procedure Act, 5 U.S.C. 702 ..... *passim*
Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.* ..... *passim*

Other:

Sunstein, "Standing and the Privatization of Public Law," 88 *Colum. L. Rev.* 1432 (1988) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1532

HAZARDOUS WASTE TREATMENT COUNCIL,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF THE ENVIRONMENTAL DEFENSE FUND, NATIONAL WILDLIFE FEDERATION AND NATURAL RESOURCES DEFENSE COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE *AMICI*

The *amici*, national environmental organizations, have a vital interest in the implementation and enforcement of environmental protection laws.[1] Each of these organiza-

---

[1] The Environmental Defense Fund (EDF) is a national, nonprofit environmental organization with more than 100,000 members dedicated to protection of human health and the environment from exposure to toxic substances, including hazardous waste. The National Wildlife Federation is a national, nonprofit citizen conservation organization with more than 5 million members dedicated to the wise use, proper management and protection of natural resources. The Natural Resources Defense Council (NRDC) is a national, nonprofit environmental organization with approximately

tions has been an active participant in the development and implementation of the Resource Conservation and Recovery Act (RCRA), federal legislation requiring EPA to establish regulations ensuring the safe management of hazardous waste from "cradle to grave."

RCRA and many other environmental laws require executive agencies to implement complex regulatory schemes to protect against damage to public health and the environment. To ensure that these agencies carry out their statutory responsibilities, Congress has broadly authorized judicial review of agency decisions under the Administrative Procedure Act, 5 U.S.C. 702, and the underlying environmental statutes, *e.g.*, 42 U.S.C. 6976. As direct beneficiaries of the environmental protection laws, *amici* have a vital interest in ensuring that judicial review is available when executive agencies fail to carry out their statutory responsibilities.

The decision below skews Congress' plan for implementation of the environmental laws by erecting an artificial barrier to the courthouse for one class of business—firms with a financial interest in effective environmental enforcement—while permitting unfettered access to the courts for businesses opposed to stringent implementation of the environmental laws. Congress realized that the solution to many environmental problems would require the development of new technologies. It understood that a complex regulatory scheme was necessary to stimulate the development of technology for the safe treatment and disposal of hazardous waste. RCRA is a complicated statute. Proper implementation of it demands an appreciation of scientific and economic issues on the cutting edge of technological development. It is hard to believe that Congress expected important regulatory decisions to be reviewed by courts that would hear only one side of the story. Indeed, the practical effect of the decision

---

92,000 members dedicated to the protection of human health and the environment from involuntary exposure to toxics, including hazardous wastes.

below is to exclude from the courts the voices of those business interests most conversant with the innovative treatment technology Congress expressly sought to promote.

As public interest organizations with limited budgets and limited technical capabilities, *amici* are not able to pursue directly every important environmental issue affecting their members. For this reason, *amici* often coordinate their efforts with businesses with congruent interests who can bring greater technical expertise and finanical resources to bear in the pursuit of more effective environmental protection. By denying standing to firms with a financial interest in implementation of environmental laws, the decision below will impose a greater burden on *amici* to carry the weight of arguments that business groups may be better able to advance. As a result, firms who undoubtedly satisfy all requirements for Article III standing will not have access to courts to advance statutory objectives, while regulated firms with a financial interest in opposing statutory objectives will continue to have access to court. This will hinder the advancement of *amici's* interests in environmental protection and undermine *amici's* ability to work with those firms with unique experience and expertise in this area.

The District of Columbia Circuit is the *exclusive* venue for review of RCRA regulations. Thus, for all practical purposes, the decision below permanently will bias judicial review under RCRA by systematically excluding from the courts businesses with unique expertise who seek to promote the very interests Congress sought to foster.

Amici submit that the decision below is erroneous. Because it will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief in support of the petition for certiorari.[2]

---

[2] Pursuant to Rule 36 of Rules of the Court, the parties have consented to the filing of this brief in support of the petition for

REASON FOR GRANTING THE WRIT

I. THE DECISION BELOW ADOPTS A NOVEL AND RESTRICTIVE INTERPRETATION OF THE "ZONE OF INTERESTS" TEST FOR PRUDENTIAL STANDING IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

This Court has long recognized that the class of parties who may obtain judicial review of agency action is not confined to regulated entities. *The Chicago Junction Case*, 264 U.S. 258 (1924); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Sierra Club v. Morton*, 405 U.S. 727 (1972). Repudiation of a "private-law model" of standing has been accompanied by this Court's repeated recognition that the judicial review provisions of the Administrative Procedure Act (APA) are to be broadly construed. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986); *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986). Applying this principle, the Court repeatedly has upheld the standing of litigants injured by agency action to seek judicial review under the APA. *See, e.g., Investment Company Institute v. Camp*, 401 U.S. 617 (1971); *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987).

The Court has required that litigants who otherwise meet Article III requirements for standing satisfy a liberally applied "zone of interests" test first articulated in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). The test outlined in *Data Processing* is based on the Court's interpretation of section 10 of the Administrative Procedure Act (APA), 5 U.S.C. 702, which "grants standing to a person 'ag-

---

a writ of certiorari. Their letters of consent have been filed with the Clerk of the Court.

grieved by agency action within the meaning of a relevant statute'." 397 U.S., at 153. Emphasizing the "broadly remedial purpose" of judicial review under the APA, 397 U.S., at 156, the Court concluded that standing should be widely available to persons suffering injury as a result of agency action. Thus it required only that "the interest sought to be protected by the complainant [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.*, at 153.

In subsequent decisions, the Court has continued to adhere to a liberal interpretation of the "zone of interest" test. *Investment Company Institute v. Camp*, 401 U.S. 617 (1971). Most recently in *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987), the Court explained the rare circumstances in which judicial review would be denied to a plaintiff who otherwise would qualify for standing:

> "In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." 479 U.S., at 399.

The Court emphasized that this "test is not meant to be especially demanding," noting that "there need be no indication of a congressional purpose to benefit the would-be plaintiff." *Id.*

Despite this Court's admonition in *Clarke*, the court below denied standing to petitioner Hazardous Waste Treatment Council even though petitioner's interests were directly related to, and entirely consistent with, statutory purposes. Animated by its concern over "the apparent anomaly of regulated entities demanding stricter regulation," Pet. App. 5a, the court, *sua sponte*, did precisely what *Clarke* forbade. Reversing the presumption

in favor of standing, it held that the Treatment Council's financial interest in implementation of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.*, disqualified it from challenging EPA regulatory decisions in the absence of a clear indication of congressional intent to benefit the treatment industry. This holding misapplies the zone of interests test and ignores the clear purposes of RCRA.

The statute and legislative history of RCRA are replete with references to the congressional objective of stimulating the development of alternative technologies for treatment of hazardous wastes, as reviewed in the Treatment Council's Petition, *see* Pet. at 15-17. The court below dismissed this ample evidence of legislative intent by concluding that it "shows neither that Congress intended to benefit recycling and disposal firms nor that such firms' interests are more than 'marginally related' to Congress's environmental purposes." Pet. App. at 11a It did so by ressurecting the very notion specifically rejected by the Court in *Data Processing*, *Investment Company Institute*, and *Clarke*: that the zone of interests test requires specific evidence of intent to benefit.[3] By holding that firms that have invested in the kind of sophisticated treatment technology Congress sought to encourage lack standing to challenge EPA's failure to implement RCRA properly, the decision below directly conflicts with this Court's articulation of the zone of interests test.

The court below found no reason to believe that hazardous waste treatment firms were "suitable challengers of the agency," Pet. App. 12a, and noted that "the consumers of the environmental purity afforded by RCRA seem highly suitable champions of enforcement," Pet.

[3] Indeed, the court below referred to "the absence of either some explicit evidence of an intent to benefit such firms, or some reason to believe that such firms would be unusually suitable champions of Congress's ultimate goals," Petition, App. 11a.

App. at 14a. But the existence of other suitable challengers of agency disregard of RCRA does not diminish the Treatment Council's standing. Unlike the situation in *Block v. Community Nutrition Institute*, 467 U.S. 340, 347 (1984), recognition of the Treatment Council's standing would not "severely disrupt [a] complex and delicate administrative scheme." Firms in the business of providing hazardous waste treatment services have unique experience and expertise in the development of safe waste disposal alternatives. Their experience and expertise is particularly relevant on issues involving the availability of treatment technology, issues that frequently arise under RCRA. The participation of such firms in the administrative process serves to advance RCRA's goal of ensuring safe management of hazardous waste while complementing the efforts of groups like *amici* who are not themselves involved in the business of providing waste treatment services. *Amici* therefore often rely on groups like the Treatment Council to take the lead in seeking review of EPA regulations.[4]

The court below could not deny that the Treatment Council's interests in this case would serve to advance the statutory goals of RCRA. Instead, the court tried to denigrate this congruity of interests by characterizing it as accidental and by arguing that in another case the Treatment Council's interests may diverge from statutory goals. Pet. App. at 11a-12a. Yet, as the legislative his-

[4] The Hazardous Waste Treatment Council has joined with environmental organizations as co-plaintiffs in successfully challenging EPA's failure to implement other provisions of RCRA. *See Environmental Defense Fund v. EPA*, 852 F.2d 1316 (D.C. Cir. 1988), *cert. denied*, 109 S.Ct. 1120 (1989) (resulting in court order requiring federal regulation of certain hazardous smelter wastes); *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 270 (D.C. Cir. 1988) (resulting in court order overturning EPA decision not to regulate used oil as a hazardous waste). In the cases decided below, *amici* relied on the Treatment Council to pursue judicial review of unlawful EPA regulatory decisions without *amici's* direct participation.

tory of RCRA demonstrates, see Pet. at 15-17, the congruence of interests in this case is anything but accidental. The possibility that a party's interests may in other cases fall outside the zone of interests protected by a statute cannot justify denying that party standing in cases where its interests are congruent with statutory purposes. Moreover, the court's speculation that "technical fidelity to law" could, in other cases, harm the environment if required regulations boomerang, Pet. App. at 12a, is not grounds for denying the Treatment Council standing; rather it indicates only that Congress, like other branches of government, is not always prescient when it makes decisions.

National environmental groups like *amici* play an important role in ensuring the implementation of statutes to protect the environment, but their resources are severely limited. Thus they typically participate in the administrative process only in cases of the greatest significance. Although regulated firms also have limited resources, their financial interest in the outcome of regulatory decisions ensures their widespread participation in the administrative process.

Firms involved in the hazardous waste treatment industry have experience and technical expertise that can be extremely valuable in the development and implementation of hazardous waste regulations. Yet the decision below precludes firms from seeking judicial review of RCRA regulatory decisions unless they are regulated entities motivated by a financial interest in *weakening* regulations. Such a result "would tend to allow regulated industries, but not regulatory beneficiaries, to have access to court—thus imposing a perverse set of incentives on administrative actors by inclining them against regulatory implementation when it is legally required." Sunstein, "Standing and the Privatization of Public Law," 88 *Colum. L. Rev.* 1432, 1463 (1988). This is inconsistent with the decisions of this Court and would frustrate the implementation of statutory purposes.

CONCLUSION

For the reasons noted above, the petition for certiorari should be granted.

Respectfully submitted,

Of Counsel:

KAREN L. FLORINI
Environmental Defense Fund
1616 P Street, N.W.
Washington, D.C. 20036
(202) 387-3500

NORMAN L. DEAN, JR.
ERIK D. OLSON
National Wildlife Federation
1400 16th Street, N.W.
Washington, D.C. 20036
(202) 797-6890

JACQUELINE M. WARREN
Natural Resources Defense Council
40 W. 20th Street
New York, New York 10011
(212) 727-2700

ROBERT V. PERCIVAL *
University of Maryland
School of Law
500 W. Baltimore Street
Baltimore, Maryland 21201
(301) 328-8030

* *Counsel of Record for Amici Curiae*

May 19, 1989